Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT E. STEPHAN, et al.,

Petitioners,

v.

REFCO, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a commodities fraud claim subject to the two-year statute of limitations contained in the Commodities Exchange Act (CEA), 7 U.S.C. § 25(c), may be abrogated by contract.

2. Whether there can be a waiver of the right to bring a Federal commodities fraud claim within two years of its discovery set forth in the Commodities Exchange Act (CEA), 7 U.S.C. § 25(c), by the execution of a contract which makes no reference to that right.

3. Whether the provision in a contract reducing the limitations period may be enforced with proving performance.

4. Whether a pre-existing fraudulent scheme can be said to "arise out of" a later executed contract.

PARTIES TO THE PROCEEDING

1. The Petitioners are R.E. Stephan, an individual residing in Reno, Nevada; the estate of L.A. Stephan (the deceased father of Plaintiff R.E. Stephan); and Target Airways, Ltd., dba Great American Airways, a Nevada corporation formerly owned by the Stephans.

2. The Respondent is Refco, Inc.

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Appendix A – Opinion and Order of the United States Court of Appeals for the Seventh Circuit in *Robert E. Stephan v. S. Jay Goldinger and Refco, Inc.*, No. 02-2250, 325 F.3d 874; 2003 U.S. App. LEXIS 6593, decided April 8, 2003 ..... App. 1a

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion affirming the judgment against petitioners is published at 325 F.3d 874; *2003 U.S. App. LEXIS 6593* decided April 8, 2003 (App. A, 1a through 8a).

STATEMENT OF JURISDICTION

The decision sought to be reviewed was entered April 8, 2003 (App. A, 1a through 8a).

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case concerns The Commodities Exchange Act provides:

> **(c) Jurisdiction; statute of limitations; venue; process**
>
> The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises. Any action brought under subsection (a) of

> this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or in the judicial district wherein any act or transaction constituting the violation occurs.

7 U.S.C. § 25(c).

This issue is recurring and of great practical importance and has fundamental significance to commodities investors nationwide.

This case presents an issue that has not been addressed previously by the Circuit Courts and this issue is squarely presented by the facts of this case.

STATEMENT OF THE CASE

Petitioners were three of many persons and entities victimized by a fraudulent commodity futures contract trade allocation scheme whereby their funds were solicited by Goldinger and then traded in Treasury Bond futures and options through Refco, Inc. In the beginning of 1996, Petitioners were informed that all funds invested at Refco were lost. They brought suit within the two years provided by 7 U.S.C. § 25(c), but beyond the one year provided in the written Refco, Inc. contract that each signed. Petitioners asserted claims of commodity fraud against all the Defendants pursuant to 7 U.S.C. § 6(b). Petitioners sought return of their $4 million out of pocket losses incurred in their Refco accounts, with interest.

After Petitioners filed their Complaint, the CFTC initiated administrative proceedings against Refco, made specific findings and imposed sanctions for misconduct

arising out of the same fraudulent scheme alleged by Petitioners. Refco neither admitted nor denied these findings, Refco accepted a $6 million fine and agreed to pay another $1 million to fund an industry study associated with order processing for futures and options and the supervision thereof. In a separate action, the CFTC also issued independent Orders Making Findings and Imposing Remedial Sanctions against four other Refco brokers for their involvement in the same fraudulent scheme. Monetary fines and disciplinary sanctions were imposed on each broker.

Background of the Legal Issue:

As early as December 1990, Petitioners began placing funds with Goldinger for investment through Refco, a registered futures commission merchant (FCM) and a clearing member of the Chicago Board of Trade. Refco executed and cleared futures contracts at the direction of Goldinger. L.A. Stephen executed a 1991 Customer Agreement, a 1991 Discretionary Account Third Party Advisor Agreement, a 1991 Acknowledgment of Conflict of Interest Agreement, a 1991 Hedge Account Representation Agreement and a 1991 Risk Disclosure Agreement. R.E. Stephen executed similar agreements in 1992, and Great American did so in 1994.

The Customer Agreements consisted of four pages of small, closely-spaced type set in two columns. In a section on the third page entitled "GOVERNING LAW," a second sentence set recited as follows: **"No action, regardless of form, arising out of transactions under this agreement may be brought by Customer more than one year after the cause of action arose."** None of the other

Agreements included such a provision or made reference to such a provision. None of the Agreements disclosed that Petitioners might be waiving statutory rights for fraud under the CEA.

The Agreements state that "all transactions shall be subject to the constitution, by-laws, rules, regulations, customs, usages, rulings and interpretations of the exchange, board of trade, contract market or other market (and its clearing house, if any) where executed and to all applicable federal and state laws and regulations."

Refco admits that it thereafter executed and cleared trades and then sent confirmations and other statements to Petitioners. Goldinger and Refco's floor broker, Constantine Mitsopoulos, fraudulently allocated trades, profits and losses between and among Goldinger's accounts at Refco. Indeed, there were at least 97 separate incidents of after market trade allocations into and out of Petitioners' accounts. In addition, Refco failed to enforce proper and timely margin requirements in Petitioners' accounts. In fact, the fraudulent scheme implemented and executed by Refco and Goldinger netted them an amount of over $33 million in gross commissions for 1994 and 1995 alone. In January 1996, this Goldinger/Refco scheme collapsed and Petitioners were informed that their total investment, which each had thought was fully hedged, was completely lost. The actual cause of the loss was not known nor who, other than Goldinger, might be responsible. Newspaper accounts in March 1996 had publicized the losses incurred by Capital Insight clients and Refco's role as the clearing broker. Public reports in March 1996 further claimed that Refco was a criminal target with respect to its dealings with Capital Insight. At the same time, however, a Mayer, Brown & Platt lawyer – one already coordinating a joint

defense agreement between Refco, Goldinger and Mitsopoulos – told the Wall Street Journal that "it would have been impossible for Refco traders to allocate gains and losses" among the Capital Insight accounts, and the press also reported that Goldinger "wasn't permitted to send orders to the trading floors in batches." For a minimum of a year after first learning of their losses in January 1996, Petitioners still were unsure which parties were at fault and which parties should be sued.

On August 28, 2000, Judge Gottschall delivered her Memorandum Opinion and Order resolving the three summary judgment motions brought by Petitioners and by Refco. (Appendix B) Refco argued that Petitioners' claims "accrued" well before December 1996 and that they were therefore barred by the one-year limitation period provided in the Customer Agreements. Judge Gottschall concluded that the limitations period provided by the CEA could be shortened – but not lengthened – by contract. Because she found that one year "appears to be" a reasonable period, she concluded that the contract governed the timeliness of all Petitioners' claims and that principles of equitable estoppel did not preclude this result due to lack of reliance on the part of Petitioners. She also concluded that Refco could enforce the limitations period regardless of whether it had materially breached its own obligations under the Customer Agreements. The Court ruled that Petitioners' own motion for summary judgment against Refco for fraud by Refco was "moot", and it was denied. That opinion was then affirmed by the Seventh Circuit on April 8, 2003. (Appendix A)

ARGUMENT

The circuit court erred by opining that the one-year claims limitation period set out in the customer agreement trumped the two-year limitations period mandated by Congress. The district court erred in affirming defendant's summary judgment as well.

I. THE CIRCUIT COURT ERRED IN REFUSING TO APPLY THE TWO-YEAR STATUTE OF LIMITATIONS MANDATED BY THE CEA.

Since 1922 Congress has sought to regulate commodities trading and a concern for investors resulted in codification of a private right of action that is of "critical importance" in enforcing the commodity laws. Congress specifically provided that this right of action was to be governed by a two-year limitations period. The CFTC determined that contractual provisions requiring claims to be brought in a lesser period of time are unenforceable as contrary to public policy as they impermissibly interfere with the regulatory scheme established by Congress.

Courts have traditionally recognized that contractual limitations will not be enforced where they would violate legislative intent, even absent an explicit statutory provision prohibiting contractual modification of statutory rights. The "critical importance" of the private right of action mandates that private parties not be permitted to alter the terms and conditions of liability. This is to ensure that no unintended remedial gap is created that disadvantages claimant-victims who choose to pursue a judicial, rather than arbitral or administrative remedy.

Where a general statute of limitation is not at issue, the policy foundations for the common law rule are missing and

extension of the rule is unwarranted. Equitable principles require the same conclusion.

A. The Statute of Limitations in the CEA Reflects an Overriding Congressional Public Policy.

The CEA dates back to 1922, and has been characterized as "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* (1982) 456 U.S. 353, 355 and n. 1, 360-67 (outlining history of commodity trading and regulation in the United States). In the CEA, Congress has emphasized the significant impact of futures and options trading by the public and professionals on commerce. *See* 7 U.S.C. § 5. As a result, one of the fundamental purposes of the CEA is to preclude fraud and deceptive practices in the trading of commodities. *See, e.g.,* 7 U.S.C. §§ 6a, 6b (originally sections 4a and 4b of the Act). The anti-fraud provisions were intended to "protect the rights of customers as fully as possible," recognizing that "those who trade in the futures markets are in no position to obtain the necessary evidence with which to proceed against unscrupulous dealers. They are not even in a position always to know the extent to which they have been cheated by dishonest brokers and commission firms." H.R. No. 1551, 72nd Cong., 1st Sess. 3 (1932); *see generally Gordon v. Shearson Hayden Stone, Inc.*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016 at 23,977-79 (CFTC 1980) (tracing legislative history).

An integral part of the CEA was the creation of the Commodity Futures Trading Commission ("CFTC" or the

"Commission") which is charged with overseeing implementation and enforcement of the CEA. *See* 7 U.S.C. § 4a; *see also Belom v. National Fut. Ass'n*, 284 F.3d 795, 796 (7th Cir. 2002) ("Congress created the CFTC as an independent agency vested with broad authority to adopt rules that, in its judgment, are necessary to carry out the purposes of the CEA.") The Commission's powers include the right to issue opinions and interpretations. *See* 7 U.S.C. § 4a(h)(3). Both Congress and the courts have concluded that additional enforcement to regulate the industry is necessary through the mechanisms of private actions.

This Court explicitly recognized this in 1982, when it upheld an implied private right of action under the anti-fraud provisions of the CEA. *See Curran,* 456 U.S. 353. Concurrent with issuance of this decision, Congress was itself moving to add Section 25 to Title 7 of the United States Code so as to regulate the private right of action. *See* Futures Trading Act of 1982, Pub.L. 97-444, Tit. II, § 235 (1983), 96 Stat. 2294, 2322 (codified at 7 U.S.C. § 25).

The provisions of Section 25 – including the prescribed limitation period – were specifically intended to "clarify" the private right of action. H.R. Rep. No. 565(I), 97th Cong., 2nd Sess., pt. 1 at 55, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3871, 3904. In this respect, Congress evinced a determination to occupy the field in this area and specified that the statutory private right would be the *exclusive* judicial remedy for defrauded investors in this area. *See* 7 U.S.C. §§ 25(a), (b). Congress also took pains not to foreclose investors' rights to seek arbitration, *see id.* § 25(a)(2), and revised the reparations procedure under the CEA. Both the judicial remedy and the reparations procedure were governed by express two-year limitations periods. *See* 7 U.S.C. §§ 18(a), 25(c). The Seventh

Circuit opinion, supporting the boilerplate customer agreement, runs counter to this precedent.

Congress has repeatedly recognized the need for investor protection and has taken pains to craft appropriate duties and rights to regulate the commodities industry. Both Congress and the courts have further declared the "critical importance of a private right of action to enforce the commodity laws." *Cange v. Stotler & Co.*, 826 F.2d 581, 584 (7th Cir. 1987); *see also* H.R. Rep. No. 565, 97th Cong., 2nd Sess., pt. 1, at 56-57, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3871, 3905-3906 ("The Committee is of the view that the right of an aggrieved person to sue a violator of the Act is critical to protecting the public and fundamental to maintaining the credibility of the futures market. To that end the Committee added a new section to the bill to provide specific authority for private rights of action for recovery of actual damages against violators of the Act.") Congress has given specific direction as to the terms upon which the rights it has granted will be exercised.

The CFTC has considered the enforceability of contractual provisions constricting the time in which an investor may seek relief under the CEA. On September 28, 2000, one month after the Judge Gottschall memorandum granting Summary Judgment, the CFTC issued its opinion and order in *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 (CFTC 2000).

Taken together, the policy goals of Congress and the positions adopted by the CFTC compel the conclusion that the two-year limitation provision of 7 U.S.C. § 25(c) trumps any differing periods prescribed by contract.

B. The CFTC Has Confirmed an Overriding Public Policy with Respect to Contractual Abrogation of Limitations.

Since the decision below, the CFTC has weighed in with its views as to the enforceability of contractual provisions constricting the time in which an investor may seek relief under the CEA. On September 28, 2000, one month after Judge Gottschall issued her opinion granting Refco's Motion for Summary Judgment, the CFTC issued its opinion and order in *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 (CFTC 2000).[1] In that case, Joseph McGough, a retired nuclear engineer with some experience trading futures, had opened accounts with introducing broker The Hampton

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[1] *McGough* was the first statement in this area by the Commission itself. At least three previous reparations decisions at the administrative hearing level, however, had previously reached the same conclusion. *See Loye v. Global Futures Holdings, Inc.*, [1998-99 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,473, at 47249 (1998) (Painter, ALJ) ("In post-hearing briefs respondents Iowa Grain and Global Futures argue that the customer agreement invalidates the two year statute of limitations of Section 14 of the Commodity Exchange Act. . . . I find these arguments without merit."); *Clemons v. McCabe*, [1996-98 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,284, at 46,270 (1998) (McGuire, J.O.) (recognizing the Commission had not expressly addressed the issue, but finding that the "exculpatory clause in Iowa Grain's customer contract – especially when read together with the attorneys fees clause – constitutes an audacious attempt to dodge its voluntarily undertaken statutory obligation, to shield its guaranteed introducing broker from any liability for violations of the Act, and to chill legitimate customer claims."); *Boice v. Sullivan*, [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,456 (1995) (Maillie, J.O.) (accord).

Group.[2] Bradford was the account executive for these accounts, which were carried and cleared by futures commission merchant Iowa Grain. *Id.* at 50,593. In connection with opening the accounts, McGough signed customer agreements with Iowa Grain that, in effect, compelled "its customers to waive the Act's two-year limitations period and substitute a one-year period." *Id.* at 50,601. McGough claimed that Respondents thereafter misrepresented the accuracy and profitability of a certain trading system, failed to disclose the risks of commodity trading and engaged in unauthorized trading. *See id.* at 50,593-94. The case ended up before the CFTC rather than the courts because McGough invoked the reparations procedure provided in the CEA. *See id.* at 50,593.

After an administrative law judge entered an award in favor of McGough, Respondents appealed to the Commission. *See id.* at 50,592. On September 28, 2000, the full Commission – Chairman Rainer and Commissioners Holum, Spears, Newsome and Erickson – heard and determined the appeal. *See id.* In so doing, the Commission directly addressed the enforceability of the one year contractual limitation period in light of the waiver it effected with respect to rights otherwise provided by the Act. *See id.* at 50,601-03.

The Commission first addressed the argument that the limitations waiver was presumptively enforceable because Congress had not expressly prohibited contractual

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[2] As the ALJ's decision made clear, McGough was literally a "rocket scientist." *See McGough v. Bradford,* [1998-99 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,420 at 46,994 (1998) (Painter, ALJ).

modifications of the duties imposed under the CEA. The Commission rejected the argument. *See id.* at 50,601-02. Looking to a recent appellate decision, *First American Discount Corp. v. CFTC*, 222 F.3d 1008 (D.C. Cir. 2000), the Commission essentially emphasized that this approach represented a threat to the regulatory scheme established by Congress and could open the floodgates to contractual provisions generally abrogating the framework established by the Act. *See McGough* at 50,602 The Commission further noted it had already concluded that the lack of an express non-waiver provision in the CEA did not preclude the Commission from so directing, if it determined this was consistent with the intent of Congress. *See id.* at 50,603.

The absence of any express statement by Congress having been addressed, the Commission then turned to a review of various statements and rules adopted with respect to its statutory mission. The Commission concluded that a shortened contractual limitation period was inconsistent with its prior rulemaking prohibiting firms from adopting contractual provisions that would limit investors' remedial rights. *Id.* The Commission then invoked its expertise in regulating the commodities forum, finding that permitting waiver of the two-year limitations period would, in fact, unreasonably deny aggrieved clients the right to pursue claims. *Id.*

The Commission further found that the efficient nature of the marketplace would result in such provisions becoming the norm, thereby nullifying an important part of the Commission's regulatory powers:

> Such a result would put the benefits of the Commission's reparations program outside the reach of the very people that Congress sought to

> protect by creating it. Moreover, once the Commission enforced this type of one-sided contractual provision, competitive pressures would likely compel other registrants to adopt similar contractual barriers to the reparations process. As a practical matter, the result would be indistinguishable from a regulatory amendment authorizing pre-dispute waiver of the right to file a reparations claim.

Id. at 50,603 n.34.

Looking to its own regulatory goals and to the intent of Congress, the Commission thus ultimately rejected the enforceability of such provisions, emphasizing that enforcing a contractual limitations waiver would essentially put the Commission in the place of upholding the agreement that the wolf made with the sheep:

> When the issue is viewed from this perspective, the fact that Illinois law (by which Iowa Grain's contract purports to be governed) recognizes a one-year limitations period as reasonable for contract actions is neither controlling nor persuasive. The issue for the Commission is whether registrants should be free to rewrite a basic statutory element of the Commission's reparations program through contracts with individual customers. While permitting such a waiver by sophisticated customers in a position to bargain with their FCM might be appropriate when there are appropriate safeguards, the customers most likely to seek relief in a reparations proceeding do not fall within this class.
>
> Accordingly, we conclude that the contractual waiver accomplished by the limitations provision in Iowa Grain's customer agreement is contrary

> to Commission Rule 12.13(a). On this basis, we decline to enforce it.

Id. at 50,603 (footnotes omitted).

C. The Commission's Construction of the CEA is Entitled to Deference by the Courts.

Since the rise of administrative agencies in the thirties, the courts have grappled with the degree of deference required with respect to agency pronouncements. Given the specialized experience and broader information available to agencies, agency interpretations are at a *minimum* entitled to consideration for their persuasive power. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *American Fed'n of Gov't Employees v. Rumsfeld*, 262 F.3d 649, 658 (7th Cir. 2001); *see also United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (reaffirming continued viability of *Skidmore* deference). But a higher degree of deference is mandated if the agency pronouncement meets the criteria that have developed from the Supreme Court's pronouncement in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction

> on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

Here, there can be no doubt that the Commission's opinion in *McGough* pertains to the construction of a statute that it administers. Indeed, one of the leading Supreme Court cases as to the necessity for agency deference involved the CFTC and regulations it adopted with respect to its reparations process. *See CFTC v. Schor*, 478 U.S. 833 (1986) (reversing D.C. Circuit for failure to defer to CFTC position on counterclaim adjudicatory authority); *see also Geldermann, Inc. v. CFTC*, 836 F.2d 310, 315 (7th Cir. 1987) (deferring to CFTC); *Indosuez Carr Futures, Inc. v. CFTC*, 27 F.3d 1260, 1264 (7th Cir. 1994); *Commodity Trend Serv. v. CFTC*, 233 F.3d 981, 987 (7th Cir. 2000).

1. Courts should not enforce industry boilerplate contracts contrary to statutory mandates, as that undermines public policy goals.

Judge Gottschall concluded that a contractual limitations period must be enforced unless there is express statutory language to the contrary. Courts consistently look to the general purpose of legislation – *not* to the presence or absence of explicit express statutory language – in determining the enforceability of contractual waivers. Courts have previously refused to allow liabilities imposed by the Act to be abrogated by contract despite the lack of specific statutory language to this effect. *See First American*

Discount Corp., 222 F.3d at 1016-18 (refusing to enforce exculpatory clause based on overall statutory scheme); *Cange*, 826 F.2d at 594-95 (recognizing exculpatory clause signed before trading commenced would not be enforceable).

Decisions in other contexts support Petitioners position. *Doe v. Blue Cross & Blue Shield United of Wisc.*, 112 F.3d 869, 874 (7th Cir. 1997) held that consideration of the contractual limitations issue should reflect how overall policies of the act would be advanced or retarded. The Illinois Supreme Court refused to enforce contractual limitations provisions, the "purpose underlying a statute cannot be circumvented by the insertion of a contrary or restricting provision" in a contract. *Severs v. Country Mut. Ins. Co.*, 89 Ill.2d 515, 434 N.E.2d 290, 292 (1982).

2. The enforcement character of the private right of action mandates that the two-year statute trump contractual limitations.

Congress and the Supreme Court have explicitly recognized the "critical importance of a private right of action to enforce the commodity laws." *Cange*, 826 F.2d at 584, specifying that the statutory private right would be the *exclusive* remedy for defrauded investors in this area. *See* 7 U.S.C. §§ 25(a), (b). The provisions of section 25 thus do not just concern a private matter that can be viewed as being alterable by an industry agreement recognized to be signed before trading could begin. Congress has made a legislative determination as to what is "reasonable" in light of its goals for the private right of action when it established the two-year limitation. There is no doubt that reducing this period thwarts the intent of Congress. *See,*

e.g., Graham Oil, 43 F.3d at 1247-48 (striking contract that attempted to limit rights granted by the Petroleum Marketing Practices Act, including a one-year statutory limitations period); *Cange*, 826 F.2d at 594-95 (recognizing exculpatory clause signed before trading commenced would not be enforceable); *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 465 F. Supp. 585, 593 (M.D. La. 1979) (refusing to enforce brokerage firm clause limiting time for objection to orders). As the Commission has concluded, registrants should not "be free to rewrite a basic statutory element" of the regulatory scheme established by Congress. *McGough,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265, at 50,603; *see also Schreider v. Rough Woodstock, Inc.,* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22683, at 30,900 (1985) (refusing to enforce prospective waiver of CEA liability).

CONCLUSION

The Court should take up this matter to clarify whether the two year statutory period in which to bring 7 U.S.C. § 6b commodity fraud claims can be trumped by a shorter contractual period without proof of performance. This question is of fundamental importance to government agencies public investors. The time is ripe to address this issue. Therefore, this petition ought to be GRANTED.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

No. 02-2250

ROBERT E. STEPHAN, *et al.*,

Plaintiffs-Appellants,

v.

S. JAY GOLDINGER, *et al.*,

Defendants,

and

REFCO, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois. Eastern Division. No. 99 C 525. Hon. Joan B. Gottschall, Judge, and Hon. Samuel P. King, Judge.

ARGUED FEBRUARY 10, 2003 – DECIDED APRIL 8, 2003

Before POSNER, MANION, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Ludwig Stephan, whose estate is one of the plaintiffs (we can disregard the others), opened a commodity futures trading account with defendant Refco (we can disregard the other defendants as well), lost his investment, and sued Refco, charging fraud in violation of the Commodity Exchange Act. The Act contains a two-year statute of limitations, 7 U.S.C. § 25(c),

and the plaintiff sued within two years (or so we may assume, though Refco, as an alternative ground for affirmance, argues that the plaintiff missed that deadline too). But Stephan's contract with Refco provided that no suit arising out of the contract or out of transactions made under its authority could be brought "more than one year after the cause of action arose," and this deadline the plaintiff admits having missed. The contract also provided that any dispute arising out of the contract or the transactions under it "shall be litigated at the discretion and election of Refco only in a court in Chicago." The plaintiff sued Refco in Nevada, and although the suit was duly transferred to Chicago in conformity with the clause just quoted, Refco counterclaimed for the legal expenses that it incurred in removing. Judge Gottschall, to whom the case was first assigned, granted Refco's motion for summary judgment on the plaintiff's claim, holding the claim barred by the contractual limitations period. Judge King later, after an evidentiary hearing, awarded Refco $9,067 on its counterclaim. The appeal challenges both rulings, certified by the district judges as final and thus appealable under Fed. R. Civ. P. 54(b). Other pieces of the suit, including other parties, remain before the district court.

The plaintiff argues that the two-year statutory limitations period is exclusive; it cannot be shortened by contract. There is no basis for such an interpretation in the language of section 25(c), which states simply that no suit shall be brought "later than two years after the date the cause of action arises." Despite this language, Refco could have agreed to a longer limitations period, *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir. 1997); *Hunter-Boykin v. George Washington University*, 132 F.3d 77, 79-80 (D.C. Cir. 1998), because a

statute of limitations is intended primarily for the benefit of the defendant, to protect him from having to defend against stale claims. *United States v. Kubrick,* 444 U.S. 111, 117 (1979); *National Railroad Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2079 (2002); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 893 (1988); *Tyler v. Runyon,* 70 F.3d 458, 465 (7th Cir. 1995). "Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 348-49 (1944). A secondary purpose is to spare the courts the burden of having to adjudicate claims that because of their staleness may be impossible to resolve with even minimum accuracy. *Lawyers Title Ins. Corp. v. Dearborn Title Corp., supra,* 118 F.3d at 1166; *Doe v. Blue Cross & Blue Shield United of Wisconsin,* 112 F.3d 869, 877 (7th Cir. 1997). That it is secondary is shown by the willingness of courts to enforce agreements to extend the limitations period.

There is no tertiary purpose of benefiting plaintiffs. There is not even a tiny handle in the statutory language for a bar against a potential plaintiff's agreeing to shorten the statutory period, and there is nothing in the policy of the statute of limitations either to which a plaintiff might appeal. It is of course true that the Commodity Exchange Act is intended for the protection of investors rather than brokers, but the statute of limitations in the Act limits

that protection and is as deserving of judicial enforcement as the provisions that favor investors. A statute is a compromise and must be enforced as such, and thus with due recognition of the various interests that gained recognition in the legislative process.

Contractual provisions that exculpate a party from statutory liability are sometimes refused enforcement, e.g., *First American Discount Corp. v. CFTC*, 222 F.3d 1008, 1016-18 (D.C. Cir. 2000); see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n. 19 (1985), notably when they have adverse effects on third parties. Cf. *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 604 (7th Cir. 1994). But the contractual provision challenged in this case is not exculpatory. It would be as a practical matter had it said that suit must be brought within five minutes after the cause of action accrues. One year, however, is not an unreasonably short time for bringing a suit, *Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188, 1205 (7th Cir. 1992); *Cange v. Stotler & Co.*, 826 F.2d 581, 584-85 (7th Cir. 1987), at least given tolling doctrines that we assume, and Refco tacitly concedes, would be read into a contractual limitations period just as they are into a statutory one, unless negatived by clear language. *Doe v. Blue Cross & Blue Shield United of Wisconsin, supra*, 112 F.3d at 877; *Cange v. Stotler & Co.*, 913 F.2d 1204, 1209-10 (7th Cir. 1990); *Koclanakis v. Merrimack Mutual Fire Ins. Co.*, 899 F.2d 673, 675-76 (7th Cir. 1990); *Velez-Gomez v. SMA Life Assurance Co.*, 8 F.3d 873, 876 (1st Cir. 1993); but see *Curry v. Vanguard Ins. Co.*, 923 F.2d 484, 486 (6th Cir. 1991). Indeed, we pointed out in the *Blue Cross & Blue Shield* case that tolling doctrines make even more sense in a contractual than in a statutory limitations case, at least

when the contractual limitations period is not tolled beyond the statutory limitations period, because as long as that condition is satisfied the *public* purpose of a limitations period – protecting the court, not just the parties, from the burden of adjudicating stale claims – is secure.

In fact the plaintiff pleaded equitable estoppel against enforcement of the one-year contractual limitation. It did so on the basis of statements made by Refco's lawyer and reported in the *Wall Street Journal* denying liability. The plea fails. There is no evidence that Stephan read the article or otherwise learned of the statements, let alone that he relied on it or on them. And anyway a denial of liability is not a basis for equitable estoppel – otherwise a statute of limitations would never run unless the potential defendant confessed error before he was sued! *Mitchell v. Donchin,* 286 F.3d 447, 451 (7th Cir. 2002); *Bishop v. Gainer,* 272 F.3d 1009, 1014-15 (7th Cir. 2001); *Singletary v. Continental Ill. Nat'l Bank & Trust Co.,* 9 F.3d 1236, 1241 (7th Cir. 1993).

Might the contractual truncation of the statutory limitations period be fraudulent or unconscionable? No. Stephan was not an impoverished or an unsophisticated investor, and the one-year limitations period was clearly set forth in the contract. Notice by way of comparison that the statute of limitations applicable to federal employment discrimination suits is only 180 or (in some states) 300 days. 42 U.S.C. § 2000e-5(e)(1). The plaintiff does cite to us to several Illinois cases that refuse to enforce contractual limitations periods in insurance contracts. *Severs v. Country Mutual Ins. Co.,* 434 N.E.2d 290 (Ill. 1982); *Kerouac v. Kerouac,* 425 N.E.2d 543, 548-49 (Ill. App. 1981); *Burgo v. Illinois Farmers Ins. Co.,* 290 N.E.2d 371, 374 (Ill. App. 1972). But they all arise out of suits for

uninsured-motorist coverage, and are "unique" to that issue. *Kerouac v. Kerouac, supra,* 425 N.E.2d at 548-49. They reason that the purpose of the state's uninsured-motorist statute, which is to place the victim of an uninsured motorist in the same position he would occupy if the motorist were insured, creates a nonwaivable entitlement on the part of the victim of the uninsured motorist to the two-year statute of limitations governing suits against insured motorists. Whether or not this is sound reasoning, it is too remote from anything in this case to dictate our decision.

The plaintiff argues that if we uphold the one-year provision in Refco's contract, competition will force the rest of the commodities brokers to follow suit, to the great detriment of commodities investors as a class. This is an absurd argument. It is the equivalent of saying that if one seller in a competitive market reduces the quality of his product, competition will force the others to follow suit, so there will be a spiral downward. Why is it then that sellers like monopoly and consumers like competition? At argument the plaintiff's lawyer contradicted his own argument by stating that some brokerage houses have a one-year limitation and others do not, as one would expect. The shorter term is advantageous to the broker and presumably the customer is compensated, assuming there is competition among brokers – and of course there is.

Invoking the ubiquitous *Chevron* principle, the plaintiff notes that the Commodity Futures Trading Commission, which along with the courts enforces the Commodity Exchange Act, believes that one year is too short. *McGough v. Bradford,* 2000 WL 33675749, at *15-16 (CFTC Sept. 28, 2000). Setting to one side all other objections to supposing this view deserving of *Chevron* deference, we note that the

Commission offered this opinion not with reference to section 25(c), which governs damages suits under the Act, such as this suit, but rather with reference to contractual curtailments of the two-year statute of limitations applicable to actions for reparations. This is an administrative remedy favored by small investors because it is cheap, *CFTC v. Schor,* 478 U.S. 833, 836 (1986); *Rosenthal & Co. v. CFTC,* 614 F.2d 1121, 1122-23 (7th Cir. 1980) – the administrative equivalent of a small claims court, *Myron v. Hauser,* 673 F.2d 994, 1001 (8th Cir. 1982) – but also (one reason it is cheap) difficult to activate within a year because of limitations on discovery. See 17 C.F.R. §§ 12.30-12.36; Kenneth M. Raisler & Edward S. Geldermann, "The CFTC's New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes," 40 *Business Lawyer* 537, 563 (1985). Although even in federal civil cases discovery takes place (with immaterial exceptions) after rather than before a suit is filed, the more limited that discovery is the more pre-litigation investigating a plaintiff must do, and so he needs more time before suing than if he had the usual expansive modern rights of discovery.

So much for the plaintiff's challenge to the contractual limitations period and we turn now to Refco's counterclaim based on the contractual venue provision. Such clauses generally are valid, see *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593-95 (1991), but the plaintiff argues that in this case "the clause was obviated by fraud." We cannot begin to understand the argument. This is a fraud case, all right, but the alleged fraud involves Refco's handling of the commodity futures trades made in the plaintiff's account; there is no contention that the *contract* was procured by fraud. Even if it were procured

by fraud, the venue provision would be valid by analogy to the arbitrability of disputes arising out of contracts procured by fraud when there is no argument that the arbitration provision itself was procured by fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Air Line Pilots Ass'n, Int'l v. Midwest Express Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002); *Great Earth Cos. v. Simons*, 288 F.3d 878, 889-90 (6th Cir. 2002); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 695 (8th Cir. 1994). There isn't the remotest suggestion that the venue provision in Refco's contract with the plaintiff was a product of fraud.

The plaintiff missed a better argument. The venue provision does not state that any dispute must be litigated in Chicago – only that it must be litigated "at the election and discretion" of Refco in Chicago. This is consistent with the plaintiff's having filed the suit elsewhere – for it might have filed it in a venue in which Refco would be perfectly content to litigate. To the extent that the plaintiff fought removal, it would be violating the venue provision, but not, as it seems to us, otherwise. However, the argument has been waived, so both rulings that the plaintiff has appealed from are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT E. STEPHAN, the Estate of LUDWIG AUGUST STEPHAN, by Donald L. Muckel as Special Administrator, and TARGET AIRWAYS, LTD., d/b/a GREAT AMERICAN AIRWAYS, a Delaware Corporation, Debtor-in-Possession,	)	No. 99 C 525
Plaintiffs,	)	
v.	)	Judge
S. JAY GOLDINGER, CAPITAL INSIGHT BROKERAGE, CAPITAL INSIGHT, INC., and REFCO, INC.,	)	Joan B. Gottschall
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Robert E. Stephan, the Estate of Ludwig A. Stephan, and Target Airways, Ltd. d/b/a Great American Airways, have brought suit against S. Jay Goldinger, Capital Insight, Inc. ("CI"), Capital Insight Brokerage ("CIB"), and Refco, Inc. stemming from the loss of millions of dollars invested by plaintiffs with defendants. Plaintiffs allege that Goldinger misrepresented the nature and risks of investments he made with plaintiffs' funds, and that he, through his control of CI and CIB, effected a variation of a Ponzi scheme in which new funds and funds of other customers were used to meet deficits and losses in existing

customer trading accounts to give the appearance of profits. Plaintiffs allege that Goldinger placed many of these investment accounts with Refco, and that Refco participated in the scheme by treating the accounts of Goldinger's investors as a combined entity, failing to enforce proper margining of the accounts, and improperly allocating trades, profits, and losses among the accounts.

Plaintiffs' amended complaint sets forth four causes of action – commodity fraud under 7 U.S.C. § 6b, common-law fraud, breach of fiduciary duty, and civil conspiracy – against all defendants, and one cause of action – negligence – against Refco alone. Refco has filed a three-count counterclaim, alleging that plaintiffs breached the parties' forum selection agreements, covenants not to sue, and indemnification and hold harmless agreements. Plaintiffs and Refco have now filed cross-motions for summary judgment on plaintiffs' claims, and Refco has moved for summary judgment on its counterclaim for breach of the forum selection agreements.

Analysis

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Timeliness is the first ground on which Refco has moved for summary judgment on plaintiffs' claims. Refco argues that plaintiffs' suit is time-barred under the terms of their contracts with Refco. The customer agreements provide that "[n]o action, regardless of form, arising out of transactions under this agreement may be brought by Customer more than one year after the cause of action arose." (Refco' Exh. 6 ¶ 18) *Refco contends that plaintiffs' claims* accrued well before December 1996 – *i.e.*, one year before plaintiffs filed their complaint in December 1997.

Plaintiffs do not challenge Refco's characterization of the timing of their claims' accrual, admitting that they learned of problems with their investments when they received a letter from Goldinger in January 1996. Rather, plaintiffs' challenge is directed toward Refco's suggestion that a one-year limitations period should apply in the first place. Plaintiffs contend that the contractual one-year period does not alter the two-year limitations period set forth in the Commodity Exchange Act, 7 U.S.C. § 25(c), relying on *Madero v. Refco, Inc.*, 934 F. Supp. 282 (N.D. Ill. 1996), as support.

In *Madero*, Judge Bucklo ruled that the parties were not able to contractually alter the CEA's two-year limitations period, reasoning that "[p]ermitting the parties to contract for a shorter limitations period would ... be contrary to public policy." *Id.* at 284. Judge Bucklo reached her conclusion by extrapolating from language found in two Seventh Circuit rulings.

First, in *Cange v. Stotler and Co.*, 826 F.2d 581 (7th Cir. 1987) ("*Cange I*"), the court upheld a contractual limitations period where the cause of action accrued before the CEA's two-year limitations period was applicable.

After observing that "courts will ordinarily uphold contractual limitations periods of one year or more," the court ruled that:

> . . . Congress' silence on a limitations period for pre-January 11, 1983, causes of action shows its willingness to accept reasonable limitations periods rather than a strong policy in favor of some particular limitations period. Because Congress did not provide an express statute of limitations applicable to this cause of action, allowing the parties to contract for a shorter limitations period than that which would be borrowed from state law is not contrary to public policy, assuming the contracted-for limitations period is reasonable, as is the case here.

Id. at 584.

The second case relied on by Judge Bucklo is *Taylor v. Western and S. Life Ins. Co.*, 966 F.2d 1188, 1204-05 (7th Cir. 1992), in which the court upheld the applicability of a contractual limitations period to a § 1981 claim. The court observed that "contractual limitations of action are generally upheld under Illinois law" as long as they are (1) knowingly and voluntarily accepted, (2) reasonable, and (3) not inconsistent with public policy. *Id.* at 1203-04. In determining whether Illinois law was "inconsistent with the federal policy underlying section 1981," *id.* at 1203, the *Taylor* court first recited the "general federal policy" toward limitations clauses:

> [I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than

> that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.

Id. at 1204 (quoting *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947)).

Citing *Cange I*, the court then reasoned that "by enacting section 1981 without a statute of limitations, Congress implied that it is willing to live with a wide range of state statutes and rules governing limitations of actions under section 1981." *Id.* at 1205. Accordingly, the *Taylor* court concluded that "Illinois law on contractual limitations of action is not inconsistent with the federal policy underlying section 1981." *Id.*

This court does not believe that the reasoning relied on by the *Cange I* and *Taylor* courts – *i.e.*, that the absence of a limitations period in federal statutes suggests a willingness to accept reasonable contractual limitations periods – necessarily leads to the principle extracted from it by Judge Bucklo – *i.e.*, that the inclusion of a limitations period in a federal statute forecloses any contractual alteration of that period.

In *MFS Int'l, Inc. v. International Telcom Ltd.*, 50 F. Supp.2d 517 (E.D. Va. 1999), the court ruled that the two-year limitations period provided for by the Federal Communications Act ("FCA"), 47 U.S.C. § 151, *et seq.*, did not trump the parties' contractual one-year limitations period. The FCA provides that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415(b). Defendant Telcom argued that this explicit

statute of limitations precluded the operation of a shorter contractual limitations period.

While the *MFS Int'l* court observed that "[i]t has long been well-settled that parties may agree to a limitations period shorter than that provided by state law," *MFS Int'l*, 50 F. Supp.2d at 521 (citing *Missouri, K&T R. Co. v. Harriman Bros.*, 227 U.S. 657, 672 (1913)), Telcom contended that "the analysis changes when a federal statute of limitations is at issue," *id.*, relying on *Taylor* for the proposition that when Congress sets an express statute of limitations, "parties may not enforce a contract for a shorter limitations period as such a contract would be contrary to public policy." *Id.* at 522. The court rejected this extrapolation from *Taylor*, noting that *Madero* is the only case adopting Telcom's argument and concluding that *Taylor* more sensibly stands for the narrower notion "that parties may not shorten a Congressionally-enacted limitations period that precludes shortening either explicitly or by clear implication." *Id.* The court reasoned further that federal statutes of limitations "neither explicitly nor implicitly embody a prohibition or policy against private agreements shortening the limitations period." *Id.* "Absent such a prohibition or policy," the court found "no reason to conclude that private agreements shortening a federal limitations period violate public policy." *Id.*

The *MFS Int'l* court then looked to the federal policy on limitations clauses set forth by the Supreme Court in *Wolfe* – that "in the absence of a controlling statute to the contrary," a contract may limit the time prescribed in the general statute of limitations. *Id.* (quoting *Wolfe*, 331 U.S. at 608). The court reasoned that "'controlling statute to the contrary' cannot mean, as Telcom argues, any federal statute of limitations, for *Wolfe* does not distinguish

between state and federal statutes." *Id.* at 522. "[A] typical state statute of limitations cannot be a 'controlling statute to the contrary'" because the general rule allowing parties to shorten a limitations period would be rendered meaningless. *Id.* Accordingly, "[a] 'controlling statute to the contrary' must sensibly be understood to mean a federal or state statute that explicitly proscribes such contractual limitations." *Id.*

This court agrees with the *MFS Int'l* court's conclusion that "there is no justification for disallowing the relevant contractual provision simply because an explicit federal statute of limitations exists when that statute does not prohibit such shortening, either explicitly or by clear implication," *Id.* at 523. In this court's view, the CEA's statute of limitations language does not suggest any intention by Congress to preclude parties from agreeing to shorten the prescribed period. The CEA provides that suits under the Act "shall be brought *not later than* two years after the date the cause of action arises." 7 U.S.C. § 25(c) (emphasis added). If the parties had sought to extend the limitations period to three years, the CEA would no doubt preempt their efforts. The CEA cannot, however, be read to cut off their freedom to contract for a shorter limitations period, provided that the time allowed is reasonable. Because one year appears to be an entirely reasonable limitations period – and indeed, plaintiffs do not contest its reasonableness – the court finds that the one-year limitations period set forth in the customer agreements governs all of plaintiffs' claims.

Despite the applicability of the one-year limitations period, plaintiffs offer two reasons why their claims are not time-barred. First, plaintiffs contend that Refco should

be equitably estopped from asserting the statute of limitations as a defense because Refco's attorney represented in the media that the company's structure made the alleged fraud impossible. Plaintiffs point to *Estate of Berger v. Refco, Inc.*, No. C98-1248C (W.D. Wash. Jul. 19, 1999), in which the court denied Refco's motion to dismiss, finding that Refco may be equitably estopped from raising their limitations defense based on plaintiffs' allegation that "Refco actively and falsely represented that the alleged fraud would have been impossible given the structure and nature of its relationship with Capital Insight and Goldinger." (Pls.' Exh. 2 at 6)

Plaintiffs' estoppel evidence consists of a January 1996 Wall Street Journal article in which Refco's attorney claims that "it would have been impossible for Refco traders to allocate gains and losses" among Goldinger's accounts, and that the potential for manipulation "was reduced by the fact that Mr. Goldinger, unlike other Refco clients, wasn't permitted to send orders to the trading floor in batches." (Pls. Exh. 1) While Plaintiffs allege that R.E. Stephan reviewed this article in 1996, the cited testimony from Stephan's deposition fails to support that point:

Q: Have you ever seen this article before, sir?

A: I might have. I don't know. I can't remember.

Q: Do you know why that article was in the corporation's or your personal files?

[objection]

A: I think somebody probably faxed it to us. I don't remember who.

Q: Do you remember – do you recall ever seeing a newspaper article about Mr. Goldinger or Refco after he reported the losses to you in December of '95?

A: Well, I – probably, I'm not – I can't say for certain.

Q: Do you know who gave them to you?

A: Well, I take – I used to take the San Francisco Examiner. I don't take it anymore. It always had a pretty good financial column. That's one place I might have seen it, San Francisco paper.

Q: Did you review The Wall Street Journal?

A: No.

Q: Do you recall any conversations you had with anyone regarding newspaper articles dealing with Refco or Goldinger?

A: Oh, maybe in '96 there might have been some with a broker that I deal with in Reno by the name of Steve Jackson.

Q: Do you recall what that conversation was?

A: No, other than he knew we took a big hit there because we told him we had this investment.

Q: Did he suggest to you that Refco was at fault?

A: No.

Q: Do you recall telling anyone prior to December of 1996 or discussing with anyone before

December of 1996 whether or not Refco was at fault for the losses?

A: I don't think so.

(Pls.' Exh. 3 at 304-06)

"In essence, equitable estoppel focuses on whether the defendant acted affirmatively to stop or delay the plaintiff from bringing suit within the limitations period." *Smith v. City of Chicago Heights*, 951 F.2d 834, 841 (7th Cir. 1992). It is available only under limited circumstances, *id.* at 840-41, and among the factors courts should look for are "a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations" and "evidence of improper purpose on the part of the defendant and the defendant's actual or constructive knowledge of the deceptive nature of its conduct." *Id.* at 841 (quoting *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 292 (7th Cir. 1986)).

Even assuming that the Wall Street Journal article contains deliberate misstatements by Refco's attorney, and that those statements were made for an improper purpose, plaintiffs' equitable estoppel argument fails. Plaintiffs have not submitted any evidence suggesting that they postponed suing Refco in reasonable reliance on the statements in the article. Indeed, judging by the cited deposition testimony, there is no evidence that plaintiffs even read the article.

The lack of factual underpinning to plaintiffs' estoppel claim is fatal here, unlike in *Berger*. In that case, the court was addressing Refco's motion to dismiss under Rule 12(b)(6). The court simply determined that the plaintiff adequately had pled an equitable estoppel defense; the

court made no finding that such a defense was supported by the evidence. Here, at the summary judgment stage, plaintiffs' conclusory allegations are insufficient. The court finds that Refco is not equitably estopped from asserting its statute of limitations defense.

In plaintiffs' final challenge to the operation of the one-year limitations period, they argue that Refco's material breaches of the customer agreements "relieve plaintiffs of any obligation to perform" under those agreements. (Pls.' Resp. at 6) Even assuming that Refco had breached the customer agreements, that does not make the limitations clause unenforceable. Plaintiffs' suggested approach to such clauses would render them largely meaningless. The one-year limitations period applies to causes of action "arising out of transactions" under the customer agreements. Obviously, such causes of action often will involve allegations that one or both parties have breached the agreement. If courts lifted the operation of a limitations clause once a party alleged that the underlying contract was breached, the clause would be restricted from operating in the very circumstances for which it was designed. Plaintiffs offer no sound reason for departing from the wealth of case law enforcing limitations clauses against a party alleging breach of contract, *see, e.g., Wood v. Allstate Ins. Co.*, 21 F.3d 741, 743-44 (7th Cir. 1994), and the court declines to do so.

Based on the one-year limitations clause set forth in the customer agreements executed by plaintiffs, the court finds that all of plaintiffs' claims against Refco are time-barred. Refco's motion for summary judgment on Counts I through V of plaintiffs' complaint is granted.

In light of this analysis, plaintiffs' motion for summary judgment must be denied as moot, as applied to Refco. However, the court must address the motion as it applies to Goldinger, CI, and CIB – none of whom have participated in this litigation to any real extent. Because Goldinger, CIB, and CI have not responded to plaintiffs' statement of material facts, those facts are deemed admitted. *See* Local Rule 56.1(b)(3)(B). Nevertheless, the court denies plaintiffs' motion for summary judgment as to these three defendants.

While plaintiffs' motion names all four defendants, the substance of their summary judgment arguments targets Refco. Nowhere in plaintiffs' summary judgment memorandum do they explain why summary judgment is warranted against CIB or CI. The only argument addressing Goldinger is the following:

> Direct evidence from plaintiffs establishes Goldinger's misrepresentations and false promises about protecting plaintiffs' principal investment. Goldinger's directions and responsibility for fraudulent allocations between and among his Refco accounts is established by deposition testimony from Refco back office personnel. [Statement ¶¶ 14-36] Additionally, Goldinger, asserting his Fifth Amendment protections, has declined to participate in this litigation. [Statement ¶ 45; Exhibit B (CJM Decl) Tab 11] Finally, Goldinger's plea agreement in the Los Angeles criminal action, his SEC and CFTC settlements, and the Judgment against him in the California case at a minimum estop him from contesting these allegations. [Statement ¶¶ 46-51; Exhibit C (FNM Decl) Tabs 10-17]

(Pls.' Mtn. for Summ. J. at 7)

It is not this court's responsibility to construct plaintiff's summary judgment arguments on their behalf. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion. . . . "); *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992) ("The moving party bears the initial burden of directing the district court to the determinative issues and the available evidence that pertains to each."). Plaintiffs may not simply make conclusory allegations of fraud, regardless of how many paragraphs from their statement of facts are cited in support, nor may they allege estoppel without explaining why estoppel applies under these circumstances. The defendants' failure to respond does not make an award of summary judgment automatic. *See Nabozny v. Podlesny*, 92 F.3d 446, 457 n.9 (7th Cir. 1996) ("[E]ven where the non-moving party fails to file a timely response to a motion for summary judgment, the district court must still review the uncontroverted facts and make a finding that summary judgment is appropriate as a matter of law."). Goldinger, CIB and CI may very well be prime targets for summary judgment. Plaintiffs' current motion, however, while nominally addressing "all defendants," sets forth a case for summary judgment only against Refco. The motion is denied, but plaintiffs have leave to refile a motion for summary judgment specifically addressing Goldinger, CIB and CI.

The final matter for the court to address is Refco's motion for partial summary judgment on Count I of its counterclaim, which alleges that plaintiffs breached the forum-selection clause in their customer agreements with Refco by suing Refco in Nevada, rather than in Chicago, as called for in the agreements. On November 12, 1998, the

federal district court for Nevada ruled that "the forum selection clauses in the Customer Agreements are valid and enforceable with respect to plaintiffs' claims," and thus transferred the action to this court. (Refco's Exh. 4 at 9) Refco argues that the undisputed facts establish that plaintiffs are liable for breach of the forum selection clause.

It is undisputed that each of the plaintiffs executed a forum selection agreement designating Chicago as the only appropriate forum for any dispute with Refco. (Pls.' Resp. to Rule 12(M) Statement ¶¶ 1-3) It is also undisputed that the district court in Nevada transferred the case to this court on the basis of those forum selection agreements. (*Id.* ¶ 4)

Plaintiffs challenge Refco's entitlement to summary judgment on the ground that Refco's breaches of the customer agreements relieved plaintiffs of any obligation to perform. Specifically, plaintiffs allege that "Refco breached its contracts with plaintiffs immediately and continuously by the illegal allocation of trades between and among the various Goldinger/Refco accounts trading T-Bond contracts." (Pls.' Resp. at 2) Plaintiffs also argue that the breaches by Refco, a fiduciary of plaintiffs, allows the contracts to be set aside. Finally, plaintiffs argue that summary judgment is precluded by the various affirmative defenses pled by plaintiffs in response to Refco's counter-claim – namely, Refco's failure to perform, Refco's fraud, estoppel, waiver and unclean hands.

The court finds plaintiffs' arguments unconvincing. "Like any contract provision, a forum-selection clause will be enforced unless enforcement would be unreasonable or

unjust or the provision was procured by fraud or overreaching." *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992). As with plaintiffs' argument regarding the limitations clause, Refco's alleged breach of the customer agreements does not make the forum selection clause unenforceable. A forum selection clause only comes into play if the parties have some dispute related to the agreement that requires litigation. Pedictably, such disputes often will involve allegations that one or both parties have breached the agreement. If a forum selection clause was invalidated every time a party alleged a breach of the underlying contract, the clause would be restricted from operating in the very circumstances for which it was designed. Plaintiffs offer no sound reason for departing from the Seventh Circuit's enforcement of forum selection clauses against a party claiming breach, *see Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), and, as with the limitations clause, the court declines to do so.

Plaintiffs' invocation of their affirmative defenses as a ground for denying summary judgment is similarly unavailing. To defeat Refco's motion for summary judgment, plaintiffs must raise an issue of material fact as to the enforceability of the forum selection clause or their compliance with that clause. Conclusory references to the doctrines of unclean hands, estoppel or waiver are not sufficient. Plaintiffs are liable for breaching the forum selection clauses of their customer agreements with Refco. Refco's motion for partial summary judgment on Count I of Refco's counterclaim is granted.

Conclusion

For the above reasons, Refco's motion for summary judgment on Counts I-V of plaintiffs' amended complaint is granted, plaintiffs' motion for summary judgment against all defendants is denied, and Refco's motion for partial summary judgment on Count I of its counterclaim is granted.

ENTER:

/s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
United States District Judge

DATE: August 28, 2000